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RECORD, CASE No. 13,446.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. ~~300.~~ 36

MARTHA P. STOTESBURY, CHARLES C. STOTESBURY, AND EDWARD T. STOTESBURY, EXECUTORS OF THOMAS P. STOTESBURY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

[illegible]

FILED DECEMBER 20, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1891.

1 In the Court of Claims.

THOMAS P. STOTESBURY, Surviving Partner of the Firm of Harris and Stotesbury,
vs.
THE UNITED STATES. } No. 14558.

I.—*Communication of the Secretary of the Treasury Referring Claim under Section* 1063 *of the Revised Statutes. Filed February* 28, 1885.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February* 27, 1885.

To the honorable the judges of the Court of Claims:

In accordance with the provisions of section 1063 of the Revised Statutes of the United States, the undersigned, Secretary of the Treasury Department, respectfully submits to your honorable court for decision a controverted question of law, viz., whether the act of Alfred Pleasonton, while Commissioner of Internal Revenue, in allowing the refunding claims of Harris, Heyl & Co. and Harris & Stotesbury was valid and final under the following state of facts, viz:

The claims in question, each one of which amounted to considerably more than three thousand dollars, were rejected by Acting Commissioner Douglass on the 20th of December, 1870, and the claimants were so notified the next day.

2 On the 29th of December, 1870, the claimants' attorneys, Collis and Brewster, addressed a letter to Mr. Douglass, requesting a hearing on behalf of their clients. To this request Mr. Douglass replied as follows:

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, *January* 4, 1871.

"GENTLEMEN: In accordance with the request contained in your letter of the 29th ult., I have to advise you that on Tuesday next, January 10, this office will give you a hearing in the case of your clients, Jno. B. Heyl & Co. and Harris & Stotesbury.

"Yours respectfully, J. W. DOUGLASS,
"*Acting Commissioner.*"

On the day before the date of this letter, viz., January 3, 1871, Alfred Pleasonton became Commissioner of Internal Revenue.

Subsequently the following endorsement was made upon each of these claims, viz:

"Allowed by Commissioner July 26, 1871.
"A. PLEASONTON,
"*Commissioner.*"

Section forty-four of the act of June 30, 1864 (13 Stat., p. 239, now section 3220 R. S.), authorized the Commissioner of Internal

Revenue, "subject to regulations prescribed by the Secretary of the Treasury," to remit, refund, &c., taxes erroneously assessed, &c.

Under this law the Secretary of the Treasury did, on the 12th of January, 1866, prescribe a set of regulations, among which was the following:

"7th. Where the case of an appeal involves an amount exceeding $250.00, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement."

In accordance with this regulation, the two claims in question were entered on a schedule, the form of which was the same
3 as the copy herewith enclosed, and on which the following words were printed:

"A schedule of claims for the refunding of taxes erroneously assessed and paid, which have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement in accordance with regulations dated January 12, 1866."

(Here the claims were described.)

"I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement.

"——— ———,

"*Commissioner.*

"Office internal revenue, ——, 18—."

The claims, having been thus scheduled, were sent with the schedule to the Secretary of the Treasury.

At that time the practice was for the Secretary to return all such claims, with his advice, to the Commissioner of Internal Revenue.

The claims in question were returned by Secretary Boutwell on August 9, 1871, to Commissioner Douglass, who, on that very day, had succeeded Mr. Pleasonton as Commissioner. Secretary Boutwell's letter returning the claims was as follows:

"AUGUST 9, 1871.

"SIR: The enclosed refunding claims of Harris and Stotesbury and Harris, Heyl & Co., transmitted by your predecessor to this office for approval, would seem to have been passed by a reversal of the construction of the law relative to sugar manufacturers which obtained during the whole period of its existence. Under these circumstances I deem it proper to return them to you for re-examination, declining to consider them unless again submitted by your office.

"(Signed) GEORGE S. BOUTWELL, *Secretary.*"

Subsequently Commissioner Douglass rejected the claims and sent notices of the rejection to the claimants. The notice to Harris, Heyl & Co. was as follows:

4

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, *Nov.* 11, 1871.

"GENTLEMEN: Your claim for $26,642.96, upon review, has been again rejected, as I conceive from the facts presented in the case that the tax was properly assessed and collected.

"Respectfully, J. W. DOUGLASS,
"*Commissioner.*"

On the 15th of January, 1881, the attorney for the claimants addressed to the then Commissioner of Internal Revenue a request that these refunding claims be sent forward for payment in accordance with the decision of Commissioner Pleasonton. To this request the following answer was made:

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, *January* 27, 1881.

"T. W. Neill, Esq., and Hon. Robert Schenck, attorneys, 314½ Walnut St., Philadelphia, Pa.

"GENTLEMEN: You request, under date of the 15th instant, that the refunding claim of Harris, Heyl & Co. for the sum of $26,642.96, and that of Harris and Stotesbury for the sum of $67,335.85, be now sent forward for payment in accordance with the decision of Commissioner Pleasonton endorsed on the claims under date of July 26, 1871.

"Your attention is called to the fact that these cases were considered and rejected December 20, 1870, by acting Commissioner Douglass, and that the claimants were then notified of his action; that on the 26th day of July, 1871, no additional proof having been filed, they were marked "Allowed" by Commissioner Pleasonton and by him sent to the Secretary of the Treasury for approval, and that on the 9th day of August, 1871, they were returned to this office by the Secretary without approval.

"In November, 1871, Mr. Douglass, then Commissioner of Internal Revenue, again notified the claimants that their claims had been rejected.

"The claims were never sent to the accounting officers of the department for adjustment and payment.

"It is a well-settled rule of law and practice that the right of an incumbent of reviewing a predecessor's decisions extends only to mistakes in matters of fact arising from errors in calculations and to cases of rejected claims in which material testimony is afterwards discovered and produced. No new or additional evidence was produced to Commissioner Pleasonton in these cases and there is nothing on file to show that he discovered any mistakes in matters of fact, such as are named in the rule above mentioned.

"It would seem, therefore, that he had no jurisdiction of the cases, and that for this reason, among others, his so-called allowance is void.

5 "Under this state of facts I must decline to forward the claims for payment. I regard them as claims rejected by a former Commissioner and subject to the rule laid down by the courts governing the reopening of such cases.

"Respectfully,

"(Signed) GREEN B. RAUM,

"*Commissioner.*"

Finally on the 29th of January, 1885, the claimants, by their attorneys, called the attention of the undersigned Secretary of the Treasury to these claims and demanded that warrants be issued in the prescribed form for the payment of these adjudicated claims.

Under this state of facts two questions arise, the decision of which by your honorable court is respectfully desired, viz:

First. Was not the first rejection of these claims on December 20, 1870, final, so that jurisdiction of the cases by a successor in office was cut off except under the rule laid down by the Supreme Court of the United States in 15 Peters, 401, that the right of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation and to cases of rejected claims in which material testimony is afterwards discovered and produced?

Second. Even if these claims were properly and rightfully open for action by Commissioner Pleasonton, which is not admitted, was his allowance of the same so valid and final under the circumstances as to be unaffected by the subsequent action of Secretary Boutwell and Commissioner Douglass?

Very respectfully, H. McCULLOCH, *Secretary.*

6 II.—*Original Petition. Filed Sept.* 7, 1885.

The petition of Thomas P. Stotesbury respectfully shows as follows, to wit:

1. He is a citizen of the United States and of the State of Pennsylvania and is the surviving member of the copartnership firm of Harris & Stotesbury, which was during the years 1865, 1866, 1867, and 1868 engaged in the business of molasses boilers in the city of Philadelphia; said firm was composed of Wharton E. Harris, now deceased, and the petitioner.

2. During the years 1865, 1866, 1867, and 1868 collectors of internal revenue of the United States, in Philadelphia, erroneously and illegally assessed certain taxes, as sugar refiners, upon the said firm of Harris & Stotesbury; and thereupon proceeded to and did erroneously and illegally collect the said taxes from the said firm during the said years, amounting to the sum of sixty-seven thousand three hundred and thirty-five dollars and eighty-five cents ($67,335.85).

7 3. The said firm was compelled to and did pay the said erroneous and illegal assessments, notwithstanding the wrongful action of the said officers; and soon afterwards and in due season the said firm of Harris & Stotesbury appealed to the

Commissioner of Internal Revenue and presented to him, at his office, in the city of Washington, a claim for the refunding of the taxes so erroneously and illegally assessed and collected, with a statement and proofs, in detail, of the various amounts included in the total amount of the claim for such illegal assessments. The application aforesaid was received at the office of the Commissioner of Internal Revenue on the 19th day of December, 1870, and, as appears from the records of the said office, was "examined and rejected Dec. 19, 1870, by Chas. Chesley." The said Chesley was neither Commissioner of Internal Revenue nor a deputy nor an acting Commissioner, and his action, as petitioner is informed and believes, was a nullity and wholly void. The petitioner is further informed and believes that the said action of said Chesley was treated as void and was disregarded by all the officers of the said revenue bureau.

4. Afterwards and on the 26th day of July, 1871, the said appeal and application of the said firm of Harris & Stotesbury for the refunding of the amount so erroneously and illegally assessed upon and collected from said firm was examined by the Commissioner of Internal Revenue; and thereupon and on the 26th day of July, 1871, he adjudicated upon the said claim and allowed the whole sum of sixty-seven thousand three hundred and thirty-five dollars and eighty-five cents ($67,335.85), and adjudged that the said sum was due and should be remitted, refunded, and paid back to the said firm, and the said claim, with the evidence of such adjudication and allowance, was forwarded to the proper officers of the Treasury for payment. The said examination, adjudication, and allow-
8 ance of the said sum of money were made by Hon. Alfred Pleasanton, who was Commissioner of Internal Revenue from about January 4, 1871, to August 9, 1871, when he was succeeded by Hon. J. W. Douglass as such Commissioner. No notice was ever served upon or brought to the knowledge of any member of the said firm of such allowance and adjudication, as this petitioner is informed and believes and charges, and neither of them had knowledge thereof, either actual or constructive, until some time in 1878 or 1879.

5. Notwithstanding such adjudication by the Commissioner of Internal Revenue and frequent demands therefor, the amount due to the said firm was not paid and it has never yet been paid nor any part thereof to the said firm or to any representative thereof, and the whole amount thereof is still due from the defendant to this petitioner.

6. The said claim was received at the Treasury Department from the Commissioner of Internal Revenue on the — day of ——, 1871, and on the 9th day of August, 1871, the Secretary of the Treasury refused to pay it, and thereupon undertook to review the said adjudication of the Commissioner of Internal Revenue, and, as the petitioner believes, to cause the said judgment to be reversed; and on the said 9th day of August, 1871, and after Commissioner Douglass had succeeded Commissioner Pleasanton, the Secretary of the Treasury returned said claim to said new Commissioner with the statement that the said claim seemed to have been passed "by a re-

versal of the construction of the law relative to sugar manufacturers which obtained during the whole period of its existence."

Your petitioner is advised by counsel and therefore insists that the Secretary of the Treasury was wholly without jurisdiction and power to review or reconsider and reverse or notify the said adjudication of the Commissioner of Internal Revenue. The said
9 new Commissioner of Internal Revenue thereupon, without any new evidence and wholly without authority of law, undertook to and actually assumed jurisdiction to reverse the judgment as aforesaid of his predecessor, and caused to be made in the records of his office an entry to that effect. In consequence of these unauthorized attempts to prevent the payment of the said claim of the said firm, delays and complications ensued and multiplied in the Treasury Department, until, finally, and after many urgent demands had been made upon the Secretary of the Treasury of the United States for payment of said sum of money so allowed and so adjudged to the said firm, and after the numerous and protracted controversies and discussions about the same, the honorable Secretary of the Treasury, on or about the 27th day of February, 1885, decided that the said claim involved controverted questions of law, and, the amount thereof exceeding the sum of three thousand ($3,000) dollars, the said Secretary of the Treasury did on the said day order that said claim be transmitted to this honorable court to be proceeded in according to the provisions of section 1063 of the Revised Statutes of the United States.

7. Your petitioner therefore claim- that there is actually due to him by reason of the premises the full sum of sixty-seven thousand three hundred and thirty-five dollars and eighty-five cents ($67,335.85), and he demands judgment in his favor, as such surviving partner, for the said sum.

Your petitioner further shows that the said claim belongs solely and exclusively to him, as the surviving partner of the said firm of Harris & Stotesbury, and that it has never been assigned in whole or in part.

The residence of your petitioner is in the city of Philadelphia, in the State of Pennsylvania, and his counsel in this cause is Thomas W. Neill, Esquire, who resides in the city of Washington.

THOS. P. STOTESBURY.

ENOCH TOTTEN,
Attorney for Claimant.

10 COMMONWEALTH OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

I, Thomas P. Stotesbury, being first duly sworn, do depose and say that I am the petitioner in the above-entitled cause, and that I am the surviving partner of the firm of Harris & Stotesbury, and that no assignment of the said claim or any interest therein has been made, and that as such surviving partner I am justly entitled to recover from the United States the amount therein claimed, after allowing all just credits and offsets, and that I believe the facts as

stated in said petition are true. I further state that no member of the said firm of Harris & Stotesbury did in any way voluntarily aid, abet, or give encouragement to rebellion against the Government of the United States.

THOMAS P. STOTESBURY.

Subscribed and sworn to by Thomas P. Stotesbury, the claimant in the above-entitled cause, before me, in the city of Philadelphia and Commonwealth of Pennsylvania, on this seventh day of August, A. D. 1885.

JOHN RODGERS,
Notary Public.

11 III.—*Traverse. Filed Sept.* 17, 1885.

And now comes the Attorney General on behalf of the United States and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

12 IV.—*Motion Suggesting Death of Claimant and Substitution of His Executors.*

And now come Martha P. Stotesbury, Chas. C. Stotesbury, and Edward T. Stotesbury, executors of the last will and testament of Thomas P. Stotesbury, the above-named claimant, and suggest the death of said claimant, and move the court for order admitting them to prosecute the said cause in lieu of said Thomas P. Stotesbury.

ENOCH TOTTEN,
Att'y for said Executors.

Filed and allowed in open court March 22, 1888.

13 V.—*Argument and Submission of Case, March* 22, 1888.

At a Court of Claims held in the city of Washington on the 22d day of March, A. D. 1888.

THOMAS P. STOTESBURY'S EXECUTORS
vs.
THE UNITED STATES. } No. 14558.

This case was argued by Mr. Totten for the claimant and Mr. Assistant Attorney General Howard for the defendants, and submitted.

14 VI.—*Findings of Fact and Conclusion of Law. Filed April* 16, 1888.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The copartnership of Harris & Stotesbury, of which the claimant is the surviving partner, was during the years 1865, 1866, and 1867 engaged in the business of manufacturing sugar in Philadelphia, Pa., and during said years and from and during January, 1865, to and including December, 1867, said firm was assessed and taxed by the proper officers of internal revenue of the United States the sum of $67,335.85 as "sugar refiners," and such assessments and taxes were duly paid to the United States by said firm, commencing, for the first payment, March 3, 1865, and ending, with the last payment, on 27th of January, 1868. The whole amount paid by said firm for and on account of such assessments and taxes was the said sum of $67,335.85.

II.

On the 19th day of December, 1870, the said firm appealed to the Commissioner of Internal Revenue and presented a claim to him against the United States for the refunding of the said sum of $67,335.85, so assessed and paid, on the ground that the taxes had been erroneously assessed and collected; which claim was in the words and figures following, to wit:

Claim under Circular No. 21 *for Taxes Improperly Paid.*

STATE OF PENNSYLVANIA, *County of Philadelphia,* } *ss:*

Thomas P. Stotesbury, of the city of Philadelphia and State and county aforesaid, being duly sworn according to law, deposes and says that he was a member of the firm of Harris & Stotesbury; that they were engaged in the business of manufacturing sugar; that between the 1st day of January, 1865, and the 31st day of December, A. D. 1867, they were assessed by the various assessors of the first district of said State internal revenue taxes, as will appear by a schedule hereto attached, marked A, all of which amounts they afterwards paid to the various collectors of internal revenue for the said district during said period, which assessment and payment of the aforesaid taxes was, as this deponent verily believes, erroneous and improper for the following reasons, viz: The said taxes were assessed upon them "as advancing the quality or value of molasses," whereas the business in which this deponent and his firm were engaged was that of manufacturing sugar from molasses, which business is not that of a "sugar refiner," as designated by the act of Congress. Our process of manufacture consisted in boiling the

molasses in a vacuum pan to the point of crystallization, then pouring it into pans, allowing the sugar to granulate, which is then run into molds, and the refuse, known as sugar-house molasses, drips into a vessel below. We used no sugar at all, nor did we improve or advance the quality or value of molasses.

And this deponent now claims that by reason of the aforesaid erroneous assessment and payment of the said sum of sixty-seven thousand three hundred and thirty-five $\frac{85}{100}$ dollars, as appears by the schedule hereto attached, they are justly entitled to have the sum of sixty-seven thousand three hundred and thirty-five $\frac{85}{100}$ dollars refunded, and they now ask and demand the same; and this deponent further makes oath that he has not heretofore presented any claim for the refunding of the above amount or any part thereof.

THOS. P. STOTESBURY.

On this claim there was written on the same day an indorsement in the words and figures following, to wit: "Examined and rejected December 19, 1870, by Cs. Chesley." On the next day the following notice was sent to the collector of internal revenue of the first district, Philadelphia, Pa., to wit:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
WASHINGTON, *December* 20, 1870.

William J. Pollock, Esq., U. S. coll., 1st dist., Philadelphia, Pennsylvania.

SIR: Refunding claims of Harris, Heyl & Co. for $26,642.96 and Harris & Stotesbury for $67,335.85 are rejected for the reason that the assessments were made pursuant to law.

Respectfully, J. W. DOUGLASS,
Acting Commissioner.

The Hon. Columbus Delano ceased to be Commissioner of Internal Revenue on the 3d day of January, 1871, and from that date until and including the 4th day of January, 1871, Acting Commissioner Douglass discharged the duties of that office.

On the 29th day of December, 1870, the attorneys for the claimants made an application to the Commissioner of Internal Revenue for a rehearing, which was granted by the acting Commissioner of Internal Revenue on the 4th of January, 1871.

III.

On the 3d day of January, 1871, Alfred Pleasonton, having been appointed Commissioner of Internal Revenue, took the oath of office, but John W. Douglass signed the letter of that bureau as acting Commissioner of Internal Revenue on the 2d, 3d, and 4th days of January, 1871; on the 5th day of January, 1871, said Pleasonton first signed as Commissioner of Internal Revenue, on which day he actually began to exercise and discharge the duties of his said office.

On the 26th day of July, 1871, having examined said claim, the Commissioner signed and transmitted to the Secretary of the Treasury the following schedule:

No. 99.—*A Schedule of Claims for the Refunding of Taxes Erroneously Assessed and Paid, Which Have Been Examined and Allowed and are Transmitted to the Secretary of the Treasury for His Consideration and Advisement in Accordance with Regulations Dated January* 12, 1866.

District.	Claimants.	Amount.	Disposition.	Reason of disposition.
1st Penn.....	Harris & Stotesbury.....	$67,335 85	Allowed.....	Were not sugar-refiners within the definition of section 75 of an act to provide internal revenue, etc., approved July 1, 1862, as amended by the act approved M'ch 3, 1863.
" "	Harris, Heyle & Co.....	26,642 96	"	

I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed and are transmitted to the Secretary of the Treasury for his consideration and advisement.

A. PLEASONTON,
Commissioner.

Office of internal revenue, July 26, 187–.

16 IV.

On the 8th day of August, 1871, the said Alfred Pleasonton, having resigned as Commissioner of Internal Revenue, ceased to discharge the duties of that office, and on the 9th day of August, 1871, J. W. Douglass, having been duly appointed, began to exercise and discharge the duties of that office. On the 9th day of August, 1871, the Secretary of the Treasury returned the said claim of the claimants to the new Commissioner of Internal Revenue, with a letter of instructions and directions in the words and figures following, to wit:

TREASURY DEPARTMENT,
WASHINGTON, D. C., *August* 9, 1871.

SIR: The enclosed refunding claims of Harris & Stotesbury and Harris, Heyl & Co., transmitted by your predecessor to this office for approval, would seem to have been passed by a reversal of the construction of the law relative to sugar manufactures which obtained during the whole period of its existence.

Under these circumstances I deem it proper to return them to you for re-examination, declining to consider them unless again submitted by your office.

Respectfully yours, GEO. S. BOUTWELL,
Secretary of the Treasury.

Hon. J. W. Douglass, Com'r of Int. Revenue.

Thereupon and on the 9th day of November, 1871, the Commissioner indorsed on said claim the following, to wit: "November 9, 1871. Rejected on re-examination. J. W. Douglass, Commissioner." On the 11th and 13th days of November, 1871, said Commissioner sent the following notices of his action of the 9th of November, 1871, to wit:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
WASHINGTON, *November* 13, 1871.

Messrs. Harris & Stotesbury, Philadelphia, Pennsylvania.

GENTLEMEN: Your refunding claim for $67,335.75 is rejected for the reason that from the facts presented the assessment and collection of the tax were according to law.

Respectfully, J. W. DOUGLASS,
Commissioner.

V.

The following is the form of the wrapper or jacket on the said claim, showing the indorsements, written or printed, as they now appear upon said wrapper, to wit:

(Office of internal revenue. Rec'd Dec. 19, '70. Div. 1, sec. 3.)

Coll'r not'd Dec. 20, '70. J. D. 3395.
Wrote claimants Nov. 13, '71. J. D.
12, 21, '70.
(46) Claim for refunding taxes collected.
Serial No. 18. No. of draft, ——. $67,335.85.
Harris & Stotesbury, claimant-.
Post-office address, Philadelphia.
Verified by—
W. J. POLLOCK, *Collector.*

17 1 district of Penna.
Assessed upon sp. tax sugar-refiners.
Basis of claim: Claims that they do not refine sugar.
Nov. 9, 1871, rejected on re-examination.
(Signed) J. W. DOUGLASS, *Comm'r.*

Examined and rejected Dec. 19, 1870, by—
(Signed) CHS. CHESLEY.

Allowed by Commissioner July 26, 1871.
(Signed) A. PLEASONTON,
Commissioner.

VI.

(1) It does not appear from the evidence that any notice of any kind was ever given to said claimants that their said claim had been adjudged in their favor and allowed by Commissioner Pleasonton on the 26th day of July, 1871, as stated in the third finding, or that it had been forwarded by him to the Secretary of the Treasury.

And (2) it does not appear from the evidence that the claimants ever had notice of any kind of the action of the Secretary of the Treasury, as recorded in his letter of August 9, 1871 (set out in the fourth finding), nor that they had notice of any kind of the intention of the new Commissioner to re-examine the said claim, or that they had notice of any kind of the action of Commissioner Doug-

lass of the 9th of November, 1871, other than that contained in the said notice of November 13th, 1871.

And (3) it does not appear from the evidence that there was any error of calculation in the decision of Commissioner Pleasonton of the 26th day of July, 1871, nor that there was any mistake of any kind therein, nor that there was any fraud of any kind practiced by the claimants in connection with said claim or said decision.

VII.

On the 15th day of January, 1880, the attorneys for the claimants wrote the following letter to the Commissioner of Internal Revenue:

PHILADELPHIA, *Jan'y 15th*, 1880.

Hon. Green B. Raum, Commissioner of Internal Revenue, Washington, D. C.

SIR: As the duly authorized attorney for Messrs. Harris & Stotesbury, molasses boilers, of this city, I beg leave to call your attention to their case and to request your early action thereon.

Their application was for a refund of $67,335.85 of taxes erroneously assessed and collected thereon as if they had been sugar-refiners.

The appeal was filed in due form and time in the office of internal revenue on the 19th day of December, 1870.

After full proof, argument, hearing, and consideration of the case, it was passed upon and allowed by the then Commissioner of Internal Revenue, as appears of record on the 26th day of July, 1871.

The claimants were not notified, however, of the adjudication and decision in their favor.

They have since learned that such notice was withheld because of some pretended revision of that decision, irregularly and illegally made by a subsequent Commissioner, and there has been no payment yet made of the said regular and valid award.

18 Referring to this state of facts, I now request that a warrant be issued in the prescribed form for the payment of this adjudicated claim.

Very respectfully, y'r ob'd't serv't,

T. W. NEILL,
Attorney for Claimants.
ROB'T C. SCHENCK,
Of Counsel.

The Commissioner of Internal Revenue, on the 27th January, 1881, declined to reopen the case or forward the claims for payment on the ground that he regarded them as rejected by a former Commissioner.

Conclusions of Law.

And upon the foregoing findings of fact the court decides as conclusions of law—

The action of Commissioner Pleasonton in transmitting the claim to the Secretary of the Treasury for his consideration and advisement did not constitute a final award upon which an action can be maintained in the Court of Claims, and the petition should be dismissed.

VII.—*Statement of Case and Opinion of the Court.*

Statement of the case.

The claimants' case rests upon a single fact, that the Commissioner of Internal Revenue, having this claim for a refund of taxes illegally collected before him, on the 26th July, 1871, signed and transmitted to the Secretary of the Treasury the schedule set forth in the preceding findings, of which the following are the only significant clauses:

No. 99. A schedule of claims for the refunding of taxes erroneously assessed and paid, which have been examined and allowed and are transmitted to the Secretary of the Treasury for his consideration and advisement in accordance with regulations dated January 12, 1866.

I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed and are transmitted to the Secretary of the Treasury for his consideration and advisement.

A. PLEASONTON,
Commissioner.

Whether this schedule and these sentences constituted a final award by the Commissioner of Internal Revenue is the only ultimate question in the case.

There are other facts connected with the official transaction, but they are matters of defense or explanation. The claimants' whole case exists in the fact that Commissioner Pleasonton on the 26th July, 1871, signed and sent to the Secretary of the Treasury the foregoing schedule.

The law which was applicable to that fact was the act 13th July, 1866 (Rev. Stat., § 3220), in these words:

The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected.

And the regulations which the Secretary of the Treasury had prescribed under the authority given to him by the statute were the following:

By the 44th section of the act of Congress to provide internal revenue, &c., approved June 30th, 1864, a duty is devolved upon

the Secretary of the Treasury to prescribe certain regulations
19 whereby the Commissioner of Internal Revenue is authorized, on appeal to him, to remit, refund, and pay back all duties erroneously or illegally assessed or collected and all duties that shall appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected. The Commissioner of Internal Revenue will therefore consider the following as the regulations established for conducting this branch of the public business:

1st. As evidence in support of the claimant's appeal, there must be required the assessor's statement of the tax assessed and the nature of the tax, with the date of assessor's list of taxes on which the tax appears, and whether it is an annual, monthly, or special list of taxes. The collector must be required to state the amount of the assessed tax committed to him to collect and the amount he actually collected.

2nd. In the examination of the merits of the appeal the Commissioner of Internal Revenue must require evidence of the character of the tax—that is, whether it was assessed on income, manufactures, &c.—that the nature of the tax may accurately appear, and the ground should be stated upon which the tax is paid back, whether because it was erroneously or illegally assessed or otherwise, carefully distinguishing between the remission of a tax or the refunding of a tax.

3rd. When the appeal has been fully heard and examined the Commissioner of Internal Revenue must put into the case a certificate of his decision or judgment, with the amount in writing which should be paid back.

4th. A proper book or docket must be carefully kept in the office of the Commissioner of Internal Revenue, in which should be entered, under its proper date, the name of the claimant, with the amount of the tax which is the subject of appeal, and the final decision of the said Commissioner.

5th. When from time to time and as the Commissioner of Internal Revenue in the course of his public duties shall complete his examination and give his judgment on these appeal cases, he will transmit a weekly list of them to the 1st Comptroller of the Treasury, together with all the vouchers upon which, as evidence, he rests his decision, as a matter of account, giving upon the list the proper date, the name of the claimant, and the amount found due each claimant.

6th. The Comptroller of the Treasury, upon receiving these lists and vouchers from the Commissioner of Internal Revenue, will cause an account to be stated and the amount to be refunded, certified to the Register of the Treasury, who will transmit a certified copy thereof to the Secretary of the Treasury, upon which a warrant on the Treasurer will be issued for the payment in the usual manner. The draft of the Treasurer, unless otherwise directed, shall be transmitted to the Commissioner of Internal Revenue, to be by him remitted either directly to the proper parties or through the collectors of the several districts, as the said Commissioner may deem best.

7th. Where the case of an appeal involves an amount exceeding two hundred and fifty dollars, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement.

H. McCULLOCH,
Secretary of the Treasury.

Treasury Department, January 12th, 1866.

It is questionable whether the Commissioner's signing the schedule before quoted was the putting "into the case a certificate of his decision or judgment," as prescribed by the third regulation. It is not shown that the Commissioner ever entered "a final decision" in the proper docket, as prescribed by the second, and it is certain that he never transmitted the claimant's case to the First Comptroller, as prescribed by the fifth. All that the Commissioner is shown to have done was "to transmit the case" "to the Secretary of the Treasury for his consideration and advisement," as prescribed by the seventh regulation, which transmission of the case was required in the express terms of that regulation "before it is finally decided."

Per curiam:

The court is of the opinion that an award of the Commissioner of Internal Revenue for the refund of a tax illegally assessed cannot become final and irrevocable before it has passed out of the control of the Commissioner by being transmitted to the First Comptroller of the Treasury, as prescribed by the fifth regulation of the Secretary. While it remains in the office of the Commissioner it is subject to his revision, correction, or revocation.

20 The court is accordingly of the opinion that in this case the action of Commissioner Pleasonton never reached the point of ultimate decision, and that when the case came back to the Commissioner's office with the advice of the Secretary of the Treasury the final decision was to be exercised by the Commissioner, and necessarily by the Commissioner then in office, a decision which was adverse to the claim and final as regards all other jurisdictions.

The court is also of the opinion that the regulations prescribed by the Secretary of the Treasury were properly within the discretion reposed in him by the statute, and, being authorized by law, had the force of law. The ultimate decision rests with the Commissioner of Internal Revenue in such cases, but the Secretary may prescribe the manner in which the claims shall be examined, the records by which they shall be authenticated, and the methods by which they shall pass to another bureau of the department. The accidental language of the schedule or other paper by which the claim is transmitted to the Secretary for his consideration and advisement cannot control the regulation, nor could it if it were intentionally used for that purpose by the Commissioner.

The court being of the opinion that no award was made upon which an action can be maintained, no opinion is expressed upon

the question whether, if such a cause of action existed, it would be barred by the statute of limitations, nor upon the question whether the Secretary of the Treasury had authority to reopen the case and refer it to this court.

The judgment of the court is that the petition be dismissed.

21 VIII.—*Judgment of the Court.*

THOS. P. STOTESBURY'S EXECUTORS
vs.
THE UNITED STATES. } No. 14558.

At a Court of Claims held in the city of Washington on the 16th day of April, A. D. 1888, judgment in the aforesaid cause was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimants' petition be dismissed.

22 IX.—*Application of Claimants for and Allowance of an Appeal.*

THOMAS P. STOTESBURY'S EXECUTORS
vs.
THE UNITED STATES. } No. 14558.

And now come the said Martha P. Stotesbury, Charles C. Stotesbury, and Edward T. Stotesbury, executors of the last will and testament of Thomas P. Stotesbury, deceased, the claimants in the above-entitled cause, and appeal to the Supreme Court of the United States from the judgment of the Court of Claims herein dismissing the petition of the claimants.

ENOCH TOTTEN,
Att'y for Claimants.

Filed May 5, 1888.

Allowed in open court May 10, 1888.

WILLIAM A. RICHARDSON,
Chief Justice.

23 In the Court of Claims.

THOMAS P. STOTESBURY'S EXECUTORS
vs.
THE UNITED STATES. } No. 14558.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the order of reference and of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of the claimants for and the allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at the city of Washington, this 10th day of December, A. D. 1888.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Case No. 13,446. Court of Claims. No. 300. Martha P. Stotesbury, Charles C. Stotesbury, and Edward T. Stotesbury, executors of Thomas P. Stotesbury, appellants, *vs.* The United States. Filed December 20, 1888.

146 US 196

Office Supreme Court U. S.
FILED.
OCT 8 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

MARTHA A. STOTESBURY ET AL.,
EXECUTORS, APPELLANTS,

v.

THE UNITED STATES.

No. 30.

BRIEF FOR APPELLANTS.

ENOCH TOTTEN,
For Appellants.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

Supreme Court of the United States.

OCTOBER TERM, 1892.

MARTHA A. STOTESBURY ET AL., EXECUTORS, APPELLANTS,

v.

THE UNITED STATES.

No. 30.

BRIEF FOR APPELLANTS.

The copartnership of Harris & Stotesbury, of which the original claimant was the surviving partner, during the years 1865, 1866, and 1867 was engaged in the business of manufacturing sugar from molasses, in Philadelphia, Pennsylvania. During those years and from and during January, 1865, to and including December, 1867, said firm was assessed and taxed by the proper officers of internal revenue of the United States the sum of $67,335.85, as "sugar refiners," and such assessments and taxes were duly paid to the United States by the firm.

On the 19th day of December, 1870, the firm appealed to the Commissioner of Internal Revenue, under the provision of section 3220 of the Revised Statutes, and pre-

sented a claim to him against the United States for the refunding of the amount so assessed and paid on the ground that the taxes had been erroneously assessed and collected (8). On this claim there was written on the same day an indorsement in the words and figures following, to wit: "Examined and rejected, December 19, 1870, by Chs. Chesley." Mr. Chesley was solicitor or law clerk for the Bureau of Internal Revenue. On the next day a notice was sent to the collector of internal revenue of the 1st District, Philadelphia, informing him that the claim had been rejected (9). This notice was signed by the acting Commissioner of Internal Revenue, Hon. J. W. Douglass. On the 29th of December, 1870, an application was made to the acting Commissioner on behalf of the claimants for a rehearing, which was granted, by the same acting Commissioner, on the 4th of January, 1871.

On the 26th day of July, 1871, having examined the claim and decided that the claimants "were not sugar refiners," and that the tax had been erroneously assessed and paid, the Commissioner of Internal Revenue allowed the claim, and indorsed in writing, over his signature, upon the wrapper or jacket containing the papers, his judgment and decision, in the words and figures following, to wit: "*Allowed by Commissioner, July* 26, 1871. A. PLEASANTON, *Commissioner*" (11.)

On the same day the Commissioner transmitted to the Secretary of the Treasury a schedule showing that the claim had been examined and allowed by him, the amount allowed, and the reason for such allowance, which reason was that the claimants "were not sugar refiners" (10). No action was taken by the Secretary on the claim until the 9th of August, 1871, when he returned the claim to the Commissioner of Internal Revenue and directed him to make a re-examination thereof; but on the day previ-

ous, the 8th day of August, 1871, the Commissioner of Internal Revenue who had examined and allowed the claim, having resigned, retired from the office, and on the 9th of August, 1871, his successor, having been appointed and qualified, assumed the duties thereof. The new Commissioner on the 9th of November, 1871, re-examined and rejected the claim, and on the 13th of that month sent a notice of his action to the claimants (11).

No notice of any kind was ever given to the claimants that their claim had been adjudged in their favor and allowed by the Commissioner on the 26th day of July, 1871. And the claimants never had any notice of the action of the Secretary of the Treasury as recorded in his letter of August 9, 1871, nor that the new Commissioner intended to re-examine the claim and the judgment of his predecessor, nor had they any notice of the action of the new Commissioner of the 9th of November, 1871, in the case, other than that contained in the said notice of November 13, 1871.

It does not appear from the evidence and it is not pretended that there was any error of calculation in the decision of the Commissioner of the 26th day of July, 1871, nor that there was any mistake therein, nor that there was any fraud practiced by the claimants in connection with said claim or said decision.

On the 15th of January, 1880, the attorneys for the claimants made application to the Commissioner of Internal Revenue for the payment of the amount of the claim, as allowed July 26, 1871, and they asserted in their application, that the claimants had never been notified of the decision in their favor (12). On the 27th of January, 1881, this demand was refused.

On the 27th of February, 1885, the Secretary of the Treasury transmitted the claim to the Court of Claims in

accordance with the provisions of section 1063 of the Revised Statutes (1). The Court of Claims dismissed the petition and the claimants appealed.

(X)

ARGUMENT AND AUTHORITIES.

The right to recover in this cause is based upon the judgment of the Commissioner of Internal Revenue of the 26th of July, 1871, and it is contended that this judgment was final and conclusive. The design of the statute authorizing this proceeding was to clothe the Commissioner with quasi-judicial powers, uncontrolled by his superior officers, in the matter of remitting, refunding, or paying back taxes erroneously assessed and collected from citizens of the United States.

The act of Congress approved July 13, 1866, which now constitutes section 3220 of the Revised Statutes, is as follows:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected."

The time for presenting these claims was not limited until the act of June 6, 1872, went into operation.

The purpose of the statute was to afford to citizens who had been oppressed by the tax collector, and others, a tribunal wherein speedy relief could be obtained. The power and authority was given to that officer, and to no

Assignment of Errors.

1. The Court of Claims erred in dismissing the plaintiffs' petition.

2. The Court of Claims erred in deciding that the judgment of the Commissioner of Internal Revenue was not final.

3. That the Court erred in refusing to render judgment in favor of the plaintiffs, for the amount claimed in the petition.

one else, and his judgment fixes the liability of the Government and is final. There is no appeal.

U. S. v. *Kaufman*, 96 U. S. 569.
U. S. v. *Saving's Bank*, 104 U. S. 728.
Bank v. *U. S.*, 15 Court of Claims.
Lybrandt v. *U. S.*, 19 Court of Claims, 461.
U. S. v. *Ferreira*, 13 How. 40.

It cannot but be seen that the Secretary of the Treasuary intended to and did in this case assert a right in himself and his office, not only to supervise, but to review and reverse or modify the decision of the Commissioner of Internal Revenue made under this statute. It will be observed that the statute provides that the Commissioner is authorized to act in such cases "*subject to regulations* prescribed by the Secretary of the Treasury." In the exercise of this authority to regulate the action of the Commissioner a former Secretary of the Treasury adopted a series of regulations, dated January 12, 1866 (10), touching the mode of payment of such claims, &c., &c. (14). Among these regulations is the following:

"Where the case of an appeal involves an amount exceeding two hundred and fifty dollars, *and before it is finally decided*, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury *for his consideration and advisement.*"

This directs that the Commissioner, before finally deciding a case, shall transmit the same, with the evidence in support of it, to the Secretary "for his consideration and advisement." Now this language may mean, and may have been intended to mean, no more than that the Commissioner shall keep the Secretary advised as to the number of such

claims presented to him, and the amount of each, so that he, as the financial head of the Government, may know how much money already in the Treasury must be refunded or paid back. But a very different construction seems to have been put upon these words by the Secretary in this case. I cannot believe that the Secretary had any power to make such a regulation if this language is to be construed as giving that officer a revisory power over the judgment and discretion of the Commissioner. It is fair to say that the intention of this statute, in speaking of "regulations," was to authorize the Secretary to regulate the manner of paying back or disbursing the funds, but it does not authorize him to regulate the manner in which the Commissioner shall reach his conclusions and judgment on the appeal. If it be true, as the courts have declared, that the judgment of the Commissioner cannot be reviewed or revised by the Secretary, then it must follow that this is the correct interpretation of the statute. If it is not, then the Commissioner is not "authorized" to "pay back" money wrongfully assessed and collected for taxes. It may be admitted that the Secretary has and should have control of the public funds, but still he may not in these cases refuse to pay in any event, nor agree to pay only on the happening of an impossible event.

The statute means that he may regulate the *manner* of paying, but impliedly declares that these adjudicated claims shall absolutely be paid in some way. The public funds must be applied to the discharge of these debts thus found to be due from the United States to citizens. The Secretary can neither prevent nor unreasonably postpone the payment by so-called regulations.

A statutory authority "to regulate and control" does not give authority to prohibit (*McConville* v. *Jersey City*, 38 N. J. L. 38). Power granted by law to the directors

of a national bank to *regulate* the manner in which its stock shall be transferred on its books does not authorize the directors to *prohibit* the transfer of the stock of a debtor of the bank by regulation (*Bullard* v. *Bank*, 18 Wall. 589.)

The statute did not mean that the discretion of the Secretary might be substituted, either in whole or in part, by means of a regulation, for that of the officer to whose discretion the power to decide was confided. It did not mean that the power of the quasi-judicial officer should be limited, controlled, or directed by means of "regulations." The Secretary may fix the *modus operandi* of paying back or refunding money, or remitting penalties; and that is all he can do. This appears to my mind to be the plain meaning of the law. We can readily comprehend why the legislature should authorize the Secretary to control the manner of drawing the funds from the public Treasury. This is necessary to avoid confusion in the public accounts. But these regulations go far beyond this, and undertake to instruct the Commissioner as to what kind of evidence he shall require and upon which he shall render judgment; yet both this Court and the Court of Claims declared that the judgment of the Commissioner upon the facts of the case cannot be re-examined—neither by the Secretary nor by the courts. The statute declares that the Commissioner is authorized, on appeal to him, to pay back such taxes as he may decide to have been wrongfully collected. The regulations limit and modify this, and say that he shall not do this without first transmitting the case to the Secretary "for his *consideration and advisement*."

This subject has been elaborately considered by this court in respect of another of the Executive Departments, and it seems to me that the decision in that case governs the asserted supervisory or appellate power in this case.

I refer to the case of Butterworth *v.* Hoe (112 U. S. 50). The Secretary of the Interior undertook to exercise appellate power over the decisions of the Commissioner of Patents in the matter of allowing and issuing patents to inventors, assuming that he possessed such authority by virtue of the several provisions of the statutes respecting his department.

By the provisions of section 441 of the Revised Statutes the Secretary of the Interior is charged with the supervision of public business relating to "patents for inventions," and by section 481 the Commissioner of Patents is required to "perform all duties respecting the granting and issuing patents" *under the direction of the Secretary of the Interior*, but it was held by this Court that this supervision and direction relates only to matters administrative and executive, and does not extend to matters in which the subordinate is directed by law to act judicially. The Court, among other things, says on this subject:

"The *supervision* of the Secretary cannot change those duties nor require them to be performed by another, nor does it authorize him to substitute his discretion and judgment for that of the Commissioner, when, by law, the Commissioner is required to exercise his own, and when that judgment, unless reversed in the special mode pointed out by judicial process, is, by law, the condition on which the right of the claimant is declared to depend. The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the Department may extend, in respect to matters purely administrative and executive, they do not extend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department; in reference

to his subordinates. Such a subjection takes from it the quality of a judicial act. That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences, and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed."

This reasoning has direct application and great force here. In that case the head of the department was enjoined to exercise supervisory power over the Commissioner of Patents. In this the head of the department was authorized to prescribe regulations to be observed by the Commissioner of Internal Revenue in discharging the duties of his office under the statute in question. If the Secretary of the Interior was not given supervisory or appellate power over the Commissioner of Patents by the provision of the statutes applicable to his office, then, *a fortiori*, this authority to prescribe regulations given to the Secretary of the Treasury did not give him power to direct or control the discretion of the Commissioner of Internal Revenue.

But the judgment of the Court of Claims in this case proceeds upon the assumption that the decision of the Commissioner "never reached the point of ultimate decision," and that the "final decision" was to be made after the "advice" of the Secretary should be received (15).

That Court, in deciding this case, said:

"It is questionable whether the Commissioner's signing the schedule before quoted was the putting 'into the case a certificate of his decision or judgment,' as prescribed by the third regulation. It is not shown that the Commissioner ever entered 'a final decision' in the proper docket, as prescribed by the second, and it is certain that he never transmitted the claimant's case to the First Comptroller, as prescribed by the fifth. All that the Commissioner is

shown to have done was 'to transmit the case' 'to the Secretary of the Treasury for his consideration and advisement,' as prescribed by the seventh regulation, which transmission of the case was required in the express terms of that regulation 'before it is finally decided.'"

It is submitted that this view of the action of the Commissioner cannot be sustained. The third regulation above referred to is in these words (14):

"When the appeal has been fully heard and examined the Commissioner of Internal Revenue must *put into the case* a certificate of his decision or judgment, with the amount in writing which should be paid back."

This certificate is nothing more than a transcript of the judgment of the Commissioner already rendered and recorded. The judgment itself in this case had been recorded on the wrapper or jacket containing the claim (p. 11) at the time the mind of the Commissioner reached a conclusion on the case. I believe it is the universal practice in all the Departments of the Government to endorse all rulings upon the wrapper containing the papers in a case. All the other entries provided for by these regulations were only copies or transcripts of this final decision. The Court of Claims says that "it is not shown that the Commissioner ever entered 'a final decision' in the proper docket," as required. If this be true it is immaterial to the tax-payer, as well as in the decison of this case. The final judgment was made and recorded. If the clerks in the Commissioner's office neglected to keep the proper books or to make the proper entries therein it cannot affect the rights of the citizen and tax-payer transacting business with the bureau, nor invalidate the judgment rendered by the Commissioner. The Court of Claims further says that "all the Commissioner is shown to have done was to trans-

mit the case to the Secretary for his consideration and advisement." He did more than this. He examined the case and decided it, and rendered a judgment in the case and made a record of it, in the usual manner, on the jacket or wrapper containing the claim (11). He then made a transcript of it in the form of a schedule, to which he appended a certificate declaring that he had "*examined and allowed*" the claim. He did not say that he thought it ought to be allowed or that he would allow it if the Secretary would permit him to exercise his honest judgment about it, but, on the contrary, he advised the Secretary that this claim *had been examined, decided, and allowed.* There was no further act for him to do. The case was ended so far as he was concerned, and it seems very plain that he intended to render a final judgment, whatever the requirements of the regulations might be.

The Commissioner of Internal Revenue in this case followed the interpretation of the statute which has since been given it by the courts, and he refused to allow his judgment to be subordinated to that of the Secretary, or he had previously, before examining the case, submitted it to the Secretary for his "consideration." There is nothing in the record to show that he did not, before his final decision, transmit the case, with the evidence to support it, to the Secretary "for his consideration and advisement," in compliance with the requirements of the seventh regulation. The courts are probably bound to presume that he did this, if it was his official duty to do it.

It does not appear to me to be material in this case, nor in any case under this statute, whether the Commission shall send a "weekly list" to the First Comptroller or not, as required by the fifth regulation. But the Court of Claims says that "it is certain" that he did not do this. It is not certain, from anything in this record, that

such a weekly list was not sent to that Comptroller. The presumption of law, therefore, is that he did perform his official duty in that respect.

The next question in the case for consideration arises out of the action of Commissioner Douglass upon the case after the Secretary had reviewed and condemned the decision of Commissioner Pleasanton. After the Commissioner who had examined and decided the case had resigned and left the office, and on the 9th of August, 1871, the Secretary returned this claim, accompanied by what was equivalent to an order to the new Commissioner for "*re-examination*;" it would have been no worse if he had directed the Commissioner to proceed with his re-examination of the case in accordance with the opinion expressed in his letter. The Secretary did no less than assume jurisdiction to review and reverse the judgment of the Commissioner. This he surely had no authority to do. If I am correct in my previous views concerning the *finality* of the decision of Commissioner Pleasanton, the liability of the United States to pay back the money wrongfully collected from the claimant was fixed and complete. This is the language of this Court in *Kaufman* v. *U. S.* (96 U. S. 567). The judgment stands for all time, unless impeached in some appropriate manner.

Furthermore, it is too well settled to need argument that the head of a Department of the Government cannot re-open a claim decided favorably by his predecessor except in cases of fraud or mistake.

U. S. v. *Bank of the Metropolis*, 15 Peters, 400.
Lovalette v. *U. S.*, 1 C. of C. 147.
R.R. Co. v. *Stimpson*, 14 Pet. 458.

This cause was referred or transmitted to the Court of Claims, February 27, 1885, by the Secretary of the Treas-

ury, in pursuance of section 1063 of the Revised Statutes. That section, so far as it is applicable to this case, is as follows :

"SEC. 1063. Whenever any claim is made against any Executive Department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, * * * the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; * * * *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said Court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."

It is argued in behalf of the defendant that the Secretary had no authority to transmit this case to that Court, because (1) the Court could not have entertained a voluntary petition of claimant's, and (2) because there are no controverted questions of law involved in the case.

If there are no controverted questions of law involved in the case, it is somewhat surprising that the able representative of the defendant should consume more than ten printed pages of his brief in the discussion of the several questions of law he found therein!

That this is one of the several classes of cases which, because of the subject-matter and character, the Court of Claims has jurisdiction, is not a debatable question since the decisions of this Court in the case of Kaufman *v.* U. S. and in the case of the U. S. *v.* Savings Bank, before cited.

It is also argued that the claim is barred by the statute

of limitations applicable to the Court of Claims. But this cannot be a sound proposition. The case was transmitted to the Court of Claims by the Secretary of the Treasury, in accordance with the statute on that subject, because controverted questions of law were involved therein. The Commissioner of Internal Revenue had decided a claim and entered up a judgment therein in favor of the tax-payer; the then Secretary of the Treasury had refused to pay it, and the tax-payer who had been compelled to pay a heavy tax, wrongfully and illegally assessed, was clamoring for his money. That the claim was *alive*, so far as the Treasury Department was concerned, and that the Secretary had a lawful right and the legal power to pay the judgment on the day he transmitted the case to the Court of Claims, there can be no reasonable doubt. There is no statute of limitations barring claims of this kind, so far as the Treasury Department is concerned, nor is there any rule limiting the time during which a claim may be prosecuted there.

The claim had been before the Department ever since its original presentation. No notice was ever sent to the claimant of the decision and allowance of the claim by Commissioner Pleasanton. This probably resulted from the authoritative attitude assumed by the Secretary of the Treasury in his emphatic letter to the Commissioner, commanding him to re-examine and reject the claim, and the subsequent action of the new Commissioner in obedience to his intimation and directions. As soon as the claimant learned of the existence of the real decision he demanded payment. To get the judgment of this Court on the questions of law involved, a subsequent Secretary of the Treasury transmitted the case to the Court of Claims for its decision.

The plea of the statute of limitations or the objection

to the jurisdiction because of the lapse of time cannot prevail. "That plea, if sustained, would defeat the very object of the reference."

U. S. v. *Lippett*, 100 U. S. 663.
Green v. *U. S.*, 18 C. of C. 97.

It is submitted that the judgment of the Court of Claims should be reversed, and directions given to that Court to render a judgment in favor of the plaintiff, for the amount of the award, to wit, for $67,335.85.

ENOCH TOTTEN,
For Appellants.

146 US 196

Office Supreme Court U. S.
FILED.
OCT 25 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1892.

MARTHA P. STOTESBURY, CHARLES C. STOTESBURY, AND EDWARD T. STOTESBURY, EXECUTORS OF THOMAS P. STOTESBURY, APPELLANTS,
vs.
THE UNITED STATES.

Term No., 30.

Appeal from the Court of Claims.

BRIEF FOR APPELLANTS.

THOS. W. NEILL,
Attorney.

J. L. Pearson, Pr., 9th and D Sts.

Supreme Court of the United States.

OCTOBER TERM, 1892.

MARTHA P. STOTESBURY *et al.*, Executors, Appellants,
vs.
THE UNITED STATES. } No. 30.

BRIEF FOR APPELLANTS.

STATEMENT.

This suit was brought in the Court of Claims by Thomas P. Stotesbury, of Philadelphia, as surviving partner of the late firm of Harris & Stotesbury, to recover the sum of $67,335.85, the amount of an award made to the firm by the Commissioner of Internal Revenue for overpaid internal revenue taxes. After the suit was brought, Mr. Stotesbury died, and his executors now represent his estate. The Court of Claims dismissed the petition, and the case was then appealed to this court.

To understand fully the exact nature of the questions involved in the case, the following brief statement of the leading facts will be found essential.

During the years 1865, 1866, and 1867 the firm of Harris & Stotesbury was engaged in the business of man-

ufacturing sugar in Philadelphia, and during that time they were assessed and taxed by the proper officers of the internal revenue of the United States the sum of $67,335.85, as sugar refiners, which assessments and taxes were duly paid by them and the money turned into the Treasury of the United States.

On the 19th of December, 1870, the firm appealed to the Commissioner of Internal Revenue for the refunding of the above-named sum, on the ground that the taxes had been erroneously assessed and collected. On the same day that the claim was filed an endorsement was made on it in the words and figures following, to wit: "Examined and rejected, December 19, 1870, by Cs. Chesley;" and on the following day the Acting Commissioner of Internal Revenue sent to the Collector of Internal Revenue of the First District, Philadelphia, this notice:

"SIR: Refunding claims of Harris, Heyl & Co., for $26,642.96, and Harris & Stotesbury for $67,335.85 are rejected for the reason that the assessments were made pursuant to law. Respectfully,

"(Signed) J. W. DOUGLASS,
"*Acting Commissioner.*"

It is proper to observe right here that Chesley, who purported to reject this claim, was neither Commissioner of Internal Revenue nor Acting Commissioner, but was simply Solicitor for the Bureau.

On the 29th of December, 1870, the attorneys for the claimants made an application to the Commissioner of Internal Revenue for a rehearing, which was granted by the Acting Commissioner on the 4th of January, 1871.

In the meantime a new Commissioner of Internal Revenue, Alfred Pleasonton, had been appointed, and he began to discharge the duties of his office on the 5th of January, 1871.

On the 26th of July, 1871, having examined this refunding claim, the Commissioner signed and transmitted to the Secretary of the Treasury the following schedule:

"No. 99.—*A schedule of claims for the refunding of taxes erroneously assessed and paid, which have been examined and allowed and are transmitted to the Secretary of the Treasury for his consideration and advisement in accordance with regulations, dated January* 12, 1866.

District.	Claimants.	Amount.	Disposition.	Reason of disposition.
1st Penn...	Harris & Stotesbury..	$67,335 85	Allowed	Were not sugar-refiners within the definition of section 75 of an act to provide internal revenue, &c., approved July 1, 1862, as amended by the act approved March 3, 1863.
" ...	Harris, Heyl & Co.....	26,642.96	"	

"I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement.

"A. PLEASONTON,
"*Commissioner.*

"Office of Internal Revenue, July 26, 187–."

On the 8th of August following, Alfred Pleasonton resigned his office as Commissioner, and on the next day J. W. Douglass was appointed and began to discharge the duties of the office. On that same day the Secretary of the Treasury returned this claim to the new Commissioner, with a letter of instructions and directions, as follows:

"TREASURY DEPARTMENT,
"WASHINGTON, D. C., *August* 9, 1871.

"SIR: The enclosed refunding claims of Harris & Stotesbury and Harris, Heyl & Co., transmitted by your predecessor to this office for approval, would seem to have been passed by a reversal of the construction of the law relative to sugar manufactures which obtained during the whole period of its existence.

"Under the circumstances, I deem it proper to return them to you for re-examination, declining to consider them unless again submitted by your office.

"Respectfully yours, GEO. S. BOUTWELL,
"*Secretary of the Treasury.*"

Thereupon on the 9th of November, 1871, the Commissioner endorsed on this claim as follows:

"November 9, 1871, rejected on re-examination.

"(Signed) J. W. DOUGLASS,
"*Commissioner.*"

On the 11th and 13th of November he gave notice to the claimants of such rejection, stating that their claim was "rejected for the reason that from the facts presented the assessment and collection of the taxes were according to law."

It does not appear that notice of any kind was ever given to the claimants that their claim had been allowed by Commissioner Pleasonton on the 26th of July, 1871, or that he had forwarded it to the Secretary of the Treasury; neither does it appear that they ever had notice of any kind of the action of the Secretary of the Treasury, as stated in his letter of August 9, 1871, or of the intention of the new Commissioner to re-examine the claim, or of the action of Commissioner Douglass of November 9, 1871, other than that contained in the notice of November 13, 1871. Nor does it appear that there was any error of calculation in the decision of Commissioner Pleasonton of the 26th of July, 1871; nor was there any mistake of any kind therein; nor was any fraud of any kind practiced by the claimants in connection with this claim or with that decision. And it was not until some time in 1878 that the claimants learned of the decision of Commissioner Pleasonton allowing their claim.

The following is an exact copy of the entries made on the "jacket" or wrapper of the papers of the claim in the Commissioner's office:

OFFICE OF INTERNAL REVENUE
Rec'd
Dec. 19 | 70.
Div. 1,
Sec. 3.

Coll'r Not'd Dec. 20 | 70.

J. D.

3395.

(46)

12 | 21 | 70.

Claim for Refunding Taxes Collected.

Serial No. 18.

No. of Draft, ... $67,335.85.

Harris & Stotesbury, Claimant.

Post Office Address, Philadelphia.

Verified by.....

W. J. POLLOCK, *Collector.*

Wrote Claimant Nov. 13 | 71. J. D.

1 District of Penna.

Assessed upon Sp. Tax Sugar Refiners.

Basis of Claim, Claim that they do not refine Sugar.

Nov. 9, 1871, Rejected on re-examination.

(Signed) J. W. DOUGLASS, *Comm'r.*

Examined and rejected

Dec. 19, 1870, by (Signed) CHS. CHESLEY.

Allowed by Commissioner

July 26, 1871. (Signed) A. PLEASONTON,

Commissioner.

On the 15th of Jannary, 1880, the attorneys for the claimants wrote the Commissioner of Internal Revenue referring to the proceedings had in relation to their claim, and requesting him to issue a warrant in their favor for its payment. The Commissioner declined to reopen the case or forward the claim for payment, on the ground that he regarded it as rejected by a former Commissioner.

The matter having been brought to the attention of the Secretary of the Treasury, that officer, on the 27th of February, 1885, referred the case to the Court of Claims under the provisions of section 1063 of the Revised Statutes of the United States, and soon afterwards the claimants filed their petition.

The grounds upon which the Court of Claims based its judgment dismissing the petition was, substantially, that there had never been a formal adjudication or final decision by the Commissioner of Internal Revenue allowing this claim. The court proceeded upon the theory that until the schedule set out above had been returned to the Commissioner by the Secretary of the Treasury and acted upon, there was no allowance by the Commissioner. In other words, that there had been no final decision by Commissioner Pleasanton, but that the claim remained unadjudicated in his office pending the action of the Secretary of the Treasury upon it.

Argument.

Three questions naturally arise in this case. *First.* Was there a final adjudication and allowance of this claim by Commissioner Pleasonton on the 26th of July, 1871? *Second.* Is the claim barred by the statute of limitations? *Third.* Did the Court of Claims have jurisdiction of the case?

These questions will be discussed in the order in which they are presented.

1. The authority given to the Commissioner of Internal Revenue to adjust and allow claims of this character, or

to refund an overpaid tax, is found in section 9 of the act of July 13, 1866, 14 Stat., 111, now carried into the Revised Statutes as section 3220.

That statute reads as follows:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected," &c.

Pursuant to the authority of this statute, the Secretary of the Treasury prescribed certain regulation which were to govern the Commissioner of Internal Revenue in the matter of the duties thus conferred upon him, among which were the following:

"*Third.* When the appeal has been fully heard and examined the Commissioner of Internal Revenue must put into the case a certificate of his decision or judgment, with the amount in writing which should be paid back.

"*Fourth.* A proper book or docket must be carefully kept in the office of the Commissioner of Internal Revenue, in which should be entered under its proper date the name of the claimant, with the amount of the tax which is the subject of appeal, and the final decision of the said Commissioner.

"*Fifth.* When, from time to time, and as the Commissioner of Internal Revenue in the course of his public duties shall complete his examination and give his judgment on these appeal cases, he will transmit a weekly list of them to the First Comptroller of the Treasury, together with all the vouchers upon which as evidence he rests his decision as a matter of account, giving upon the list a proper date, the name of the claimant, and the amount found due each claimant."

"*Seventh.* Where the case of an appeal involves an amount exceeding $250, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case with the evidence in support of it to the Secretary of the Treasury for his consideration and advisement."

It seems to be conceded on all hands that under this statute the Commissioner of Internal Revenue is constituted a special tribunal to determine what shall be sufficient evidence to warrant the refunding of taxes erroneously assessed and paid, and that his judgment on such matters is not subject to appeal, and is final, unless impeached in some appropriate manner for fraud or mistake.

This proposition is supported by many authorities, both in the Court of Claims and in this court.

Woolner v. *United States*, 136 Ct. Cl., 355.
Sybrandt v. *United States*, 19 Ct. Cl., 461.
United States v. *Kaufman*, 106 U. S., 569.
United States v. *Savings Bank*, 104 U. S., 728.

See also authorities cited on page 8 of brief of counsel for United States.

It is equally well settled also that a final decision, upon a knowledge of all the facts, made by an officer authorized to decide claims against the government, is not liable to be reopened and reviewed by his successors in office, unless the decision is founded on mistake in matters of fact, arising in errors of calculation or the absence of material testimony afterward discovered or produced. This principle is laid down very clearly in *United States* v. *Bank of Metropolis*, 15 Pet., 377, 401, where Mr. Justice Wayne, speaking for the court with reference to a case which involved the question of whether the Postmaster-General could disallow an account which had been adjudicated favorably to a claimant by his predecessor, said: "This right in an incumbent of reviewing a predecessor's decision extends to mistakes in matters of fact, arising from errors in calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced; but if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law

under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor."

See also to the same effect 14 Op. Att'y-Gen., 275; 2 Op., 463, 507, 517; 12 Op., 172, 358; 9 Op., 34; and 13 Op., 387.

While admitting the soundness of these two propositions of law, the learned court below held, and counsel for the United States now contend, that they are not applicable to this case, for the reason, as they say, that there was no final adjudication of the claim in favor of the appellants. In this connection the court below used the following language:

"The court is of the opinion that an award of the Commissioner of Internal Revenue for the refund of a tax illegally assessed cannot become final and irrevocable before it has passed out of the control of the Commissioner by being transmitted to the First Comptroller of the Treasury, as prescribed by the fifth regulation of the Secretary. While it remains in the office of the Commissioner it is subject to his revision, correction, or revocation.

"The court is accordingly of the opinion that in this case the action of Commissioner Pleasonton never reached the point of ultimate decision, and that when the case came back to the Commissioner's office with the advice of the Secretary of the Treasury the final decision was to be exercised by the Commissioner, and necessarily by the Commissioner then in office, a decision which was adverse to the claim and final as regards all other jurisdictions.

"The court is also of the opinion that the regulations prescribed by the Secretary of the Treasury were properly within the discretion reposed in him by the statute, and, being authorized by law, had the force of law. The ultimate decision rests with the Commissioner of Internal Revenue in such cases, but the Secretary may prescribe the manner in which the claims shall be examined, the records by which they shall be authenticated, and the methods by which they shall pass to another bureau of

the department. The accidental language of the schedule or other paper by which the claim is transmitted to the Secretary for his consideration and advisement cannot control the regulation, nor could it if it were intentionally used for that purpose by the Commissioner."

With all due deference to the learned court, we must insist that the record shows that this claim was allowed by Commissioner Pleasonton on the 26th of July, 1871. The "jacket" of the case, or the paper covering enclosing the papers, which is the best evidence of what the Commissioner did, shows an allowance in undisputed terms. It is there stated in so many words that the claim was allowed on that day. That constituted the judgment of the Commissioner. It matters not, so far as the appellants' rights are concerned, that he did not at that time enter it upon the docket or book, prescribed by the fourth regulation of the Secretary, above quoted; or that he did not put into the case a certificate of his decision or judgment with the amount in writing which should be paid back, as prescribed by the third regulation; or that he did not transmit it to the First Comptroller of the Treasury together with the vouchers and the other matters prescribed by the fifth regulation, above referred to. All these matters were purely ministerial. They were simply to be carried into the Treasury records for the purpose of giving notice to the claimants and all the world of the action or judgment of the Commissioner, already rendered, and they did not form any part or parcel of the judgment itself. *Kendall* v. *United States*, 2 Pet., 524, 613.

Those entries prescribed by the regulations mentioned are analogous to the entry of judgment in a court of law; and nothing is better settled in the law than that the entry of the judgment upon the record forms no part of the judgment itself.

The rule in this respect is well stated by Mr. Freeman in his excellent work on Judgments, section 38, in the following words:

"The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. A judgment is not what is entered, but what is ordered and considered. The entry may express more or less than was directed by the court, or it may be neglected altogether; yet in neither of these cases is the judgment of the court any less its judgment than though it was accurately entered. In the very nature of things the act must be perfect before its history can be so, and the imperfection or neglect of its history fails to modify or obliterate the act. That which the court performs judicially or orders to be performed is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity."

Furthermore, the schedule transmitted to the Secretary by the Commissioner on the 26th of July, 1871, shows unequivocally that the claim had been *allowed.* The words of that schedule are: "A schedule of claims for the refund of taxes erroneously assessed and paid, which have been examined and *allowed,*" &c.; and "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and *allowed.*"

Nothing is said in this schedule—nothing appears anywhere—to show that a final decision or allowance had not been made. If the contention of the United States be correct that the claim had not been allowed, then the words in this schedule are entirely misleading and fail to state the truth. It is not said that "the claims are transmitted to the Secretary for his consideration and advisement before allowance, or that if the Secretary concurs with the Commissioner's opinion they *will be* allowed;" but simply that they *are allowed.*

But it is argued that, under the seventh regulation of the Secretary of the Treasury, above quoted, the Commissioner had no power to allow this claim before transmitting it to the Secretary for his consideration and advisement, and that, having no power to allow it until it was transmitted to the Secretary, the judgment of allowance of July 27, 1871, was null and void.

To this contention it is enough to say that if the seventh regulation is susceptible of any such construction, it was itself null and void. If the construction contended for be correct, then that regulation gives to the Secretary not only the power of consideration and advisement, in the matter of refunding claims, but also the power to reverse the action of the Commissioner. If the Commissioner cannot render his judgment without submitting it to the Secretary for his approval, then he is not the special tribunal which this court has declared him to be; he would not be independent of the Secretary in the matter of adjudicating claims of this nature, but would stand in relation to him simply as an inferior court, whose judgment would not be final, but would be subject to appeal.

The statute says that the Commissioner of Internal Revenue, "subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund and pay back all duties, taxes, &c., erroneously assessed." What is the meaning of this phrase "subject to regulations prescribed by the Secretary of the Treasury?" What power is given to the Secretary under that statute? Surely not the power to control the judgment of the Commissioner and reverse an allowance made by him, but simply the power to determine the manner in which the payment shall be made. The power to regulate is not broad enough to comprehend the power to prohibit, or to destroy the independent action of the Commissioner. It is not to regulate the judgment of the Commissioner that the Secretary is given power, because in that respect the Commissioner's judgment is final; but it is the power to regulate mere ministerial matters connected with the adjudication of the claim.

To recapitulate upon this point:

We contend, first, that the Commissioner of Internal Revenue in adjudicating cases of this character is a special independent tribunal whose judgment is final, and not subject to appeal to the Secretary of the Treasury, and,

impeachable, if at all, only in an appropriate manner and tribunal, for fraud or mistake, in which the burden of impeachment is upon the government.

Second, that a final decision by an executive officer authorized to make it cannot be reopened and reviewed by his successors in office, unless fraud or mistake is shown or is manifest upon the face of the record.

Third, that Commissioner Pleasonton on the 26th of July, 1871, rendered a final decision on this claim, allowing it in full, which allowance was not subject to review or revocation at the hands of his successor, and could not be revoked by the Secretary of the Treasury.

Fourth, that the fact of the rendition of the judgment mentioned appears affirmatively on the "jacket" of the case or the wrapper containing the papers of the case, and also in the schedule transmitted to the Secretary of the Treasury.

Fifth, that the third, fourth, and fifth regulations of the Secretary of the Treasury, above set out, refer to purely ministerial duties devolving upon the Commissioner of Internal Revenue, and not to any judicial or *quasi* judicial act of his.

Sixth, that the seventh regulation also refers to ministerial duties of the Commissioner of Internal Revenue, and not to matters in which the Commissioner exercised a judicial function.

Seventh, that if that regulation be held to refer to matters of a judicial nature passed upon by the Commissioner of Internal Revenue, it is unauthorized and void, because contrary to the statute.

Second Point.

Was the claim barred by the statute of limitations? Our contention is that it was not, for several reasons:

First, it was a claim which the Treasury Department was under a legal obligation to pay at all times. The statute of limitations did not begin to run against it prior

to the application to the Secretary for payment of the award of July 26, 1871, which, as we have already stated, was in 1880.

United States v. *Taylor*, 104 U. S., 216.

This suit was brought in 1885, and was therefore within the six years prescribed by section 1069 of the Revised Statutes. The claim was recognized as not barred by the Treasury Department when it was referred to the Court of Claims. The submission under section 1063 was to get the opinion of the court on controverted questions of law, which questions, if decided in favor of the claimants, would remove any objection that the Treasury Department might have to the payment of the claim. Furthermore, the same question was decided in *United States* v. *Lippitt*, 100 U. S., 663, in which it was held substantially as we contend for here. See, also, *Green* v. *United States*, 18 Ct. Cl., 97.

We confidently submit that the bar of the statute does not operate against us in this case.

Third Point.

Did the Court of Claims have jurisdiction of this case? This question, although standing at the threshold of the case, we have reserved for the last, because we think it is so clearly answerable in the affirmative as to require little or no argument. The identical question was before this court in *United States* v. *Savings Bank*, 104 U. S., 728, 733, in which it was held that the Court of Claims has jurisdiction of a suit brought against the United States to recover back certain taxes and penalties alleged to be of the character mentioned in section 3220, Revised Statutes, where payment thereof was refused to the plaintiff, whose claim thereto had in due time been presented on appeal to and allowed by the Commissioner of Internal Revenue.

In delivering the opinion of the court in that case Mr. Chief Justice Waite said:

"If payment (of an award) is not made, by reason of the refusal of any of the officers of the department to pass or pay the claim after it has been once allowed by the Commissioner, the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the government the burden of showing fraud or mistake."

The contention of opposing counsel on this point seems to be that the Court of Claims could not take jurisdiction of the case because of the following proviso in section 1063 of the Revised Statutes:

"That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which by reason of the subject-matter and character the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."

It is said that this case does not involve disputed facts or controverted questions of law; but it seems very clear to our mind that it does involve controverted questions of law, the main question of law being whether or not the admitted acts of Commissioner Pleasonton on July 26, 1871, amounted to an allowance of the claim, our contention being that they did, while the government contends that they did not. This of itself was sufficient, under the statute, to give the court jurisdiction. But, furthermore, the case belongs to a class of cases which, by reason of the subject-matter and character, the Court of Claims might take jurisdiction of, on voluntary action of the claimant. After the refusal of the Secretary to pay the award of Commissioner Pleasonton, the right of action accrued to the claimants, as stated in *United States* v. *Savings Bank, supra;* and they might at any time within the six years thereafter have brought their suit in the Court of Claims.

United States v. *Kaufman*, 96 U. S., 567.

We think, therefore, that the Court of Claims did not err in assuming jurisdiction of this case.

For the foregoing reasons we submit that the judgment of the Court of Claims ought to be reversed with a direction to enter judgment upon the petition of the appellants for the full amount of their claim.

THOMAS W. NEILL,
Attorney for Appellants.

146 US 196

Office Supreme Court U. S.
FILED
SEP 29 1892
JAMES H. McKENNEY.
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

MARTHA P. STOTSBURY ET AL.
v.
THE UNITED STATES. } No. 30.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

JOHN B. COTTON,
Assistant Attorney-General.

We think, therefore, that the Court of Claims did not err in assuming jurisdiction of this case.

For the foregoing reasons we submit that the judgment of the Court of Claims ought to be reversed with a direction to enter judgment upon the petition of the appellants for the full amount of their claim.

THOMAS W. NEILL,
Attorney for Appellants.

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v.
THE UNITED STATES. } No. 30.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

This is an appeal by the claimants from a judgment of the Court of Claims dismissing their petition.

STATEMENT OF CASE.

In the years 1865, 1866, and 1867, Harris and Stotsbury were partners in the business of manufacturing sugar in Philadelphia, Pa.

The original petition was filed September 7, 1885, in the Court of Claims, by Thomas P. Stotsbury, as surviving partner of the firm. March 22, 1888, Thomas P. Stotsbury, having deceased, the present claimants were admitted to prosecute the cause.

From January, 1865, to and including December, 1867, the firm was assessed and taxed by the proper officers of internal revenue of the United States as "sugar refiners,"

the sum of $67,335.85, and such assessments and taxes were duly paid to the United States by the firm. The first payment was made March 3, 1865, and the last January 27, 1868.

Section 44 of the act entitled "An act to provide ways and means for the support of the Government, and for other purposes," approved June 30, 1864 (13 Stat. at L. 218, 239), provides as follows:

> SEC. 44. *And be it further enacted*, That the Commissioner of Internal Revenue, *subject to regulations prescribed by the Secretary of the Treasury*, shall be and is hereby authorized, on appeal to him made, to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and all duties that shall appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, etc.

In accordance with the duty prescribed by this section the Secretary of the Treasury promulgated certain regulations for the guidance of the Commissioner of Internal Revenue, which are found on page 13 of the transcript of record. Rule 7 provided as follows:

> 7. When the case of an appeal involves an amount exceeding two hundred and fifty dollars, *and before it is finally decided*, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement.

December 19, 1870, the firm appealed to the Commissioner of Internal Revenue, and presented to him a claim against the United States for the refunding of said sum of $67,335.85 so assessed and paid, on the ground that the taxes had been erroneously assessed and collected. On

the date of such claim an indorsement was made thereon as follows: "Examined and rejected December 19, 1870, by Cs. Chesley." On the following day notice was sent to the collector of internal revenue of the first district, Philadelphia, Pa., as follows:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, D. C., December 20, 1870.

WILLIAM J. POLLOCK, Esq.,
U. S. Collector, 1st Dist.,
Philadelphia, Penn.:

SIR: Refunding claims of Harris, Heyl & Co. for $26,642.96, and Harris & Stotsbury for $67,355.85, are rejected for the reason that the assessments were made pursuant to law.

Respectfully,

J. W. DOUGLASS,
Acting Commissioner.

It is stated in the transcript of record (p. 9) that Hon. Columbus Delano ceased to be Commissioner of Internal Revenue on the 3d day of January, 1871, and from that date until the 4th day of January, 1871, Acting Commissioner Douglass discharged the duties of that office. This statement is erroneous. Evidently it was made to account for the fact that Douglass acted as Commissioner December 20, 1870. The return of the Secretary of the Treasury to the Court of Claims, in answer to a request for information upon this matter, shows that Delano's official connection as Commissioner of Internal Revenue expired on the 31st day of October, 1870, and that Hon. John W. Douglass was acting commissioner from the 1st day of November, 1870, to the 2d day of January, 1871.

On the 29th of December, 1870, the attorneys for the claimants made an application to the Commissioner of Internal Revenue for a rehearing, which was granted on the 4th day of January, 1871.

On the 3d day of January, 1871, Alfred Pleasonton, having been appointed Commissioner of Internal Revenue, took the oath of office, but Hon. John W. Douglass signed the letters of the Bureau as Acting Commissioner of Internal Revenue on the 2d, 3d, and 4th days of January, 1871. Pleasonton began the actual exercise and discharge of his duties on the 5th day of January, 1871.

Commissioner Pleasonton, July 26, 1871, having examined the claim, signed and transmitted to the Secretary of the Treasury the following schedule:

No. 99.—A schedule of claims for the refunding of taxes erroneously assessed and paid, which have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement in accordance with regulations dated January 12, 1866.

District.	Claimants.	Amount.	Disposition.	Reason of disposition.
1st Penn.	Harris & Stotesbury.	$67,335.85	Allowed	Were not sugar refiners within the definition of section 75 of an act to provide internal revenue, etc., approved July 1, 1862, as amended by the act approved Mch. 3, 1863.
Do.	Harris, Heyle & Co.	26,642.96	....do	

I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement.

A. PLEASONTON,
Commissioner.

OFFICE OF INTERNAL REVENUE, *July* 26, 187—.

Pleasonton resigned his office on the 8th day of August, 1871, and ceased to discharge his duties on the following day, at which time Hon. J. W. Douglass, having been duly appointed, commenced to exercise and discharge the duties of the office. On the 9th day of August, 1871, Hon. George S. Boutwell, Secretary of the Treasury, having considered the matter, returned the schedule to Douglass, the new Commissioner of Internal Revenue, with a letter of advisement. Thereupon on said 9th day of November, 1871, the Commissioner of Internal Revenue indorsed on the said claim the following: "November 9, 1871, rejected on re-examination. J. W. Douglass, Comm'r."

On the 13th of November the Commissioner sent notice to the claimants that their claim was rejected for the reason that from the facts presented the assessment and collection of the taxes were according to law.

It does not appear that any notice of any kind was given to the claimants that their claim had been adjudged favorably by Commissioner Pleasonton on the 26th of July, 1871, or that it had been forwarded by the Commissioner to the Secretary of the Treasury for examination. Nor does it appear that the claimants had notice of the letter of the Secretary of the Treasury of August 9, 1871, nor of the intention of the new Commissioner of Internal Revenue to re-examine said claim. No notice was given claimants of the action of Commissioner Douglass of the 9th of November other than that contained in the letter to them of November 13, 1871. There was no evidence of any error of calculation in the decision of Commissioner Pleasonton of July 26, 1871, nor of any mistake therein other than the

statement contained in the letter of Secretary Boutwell, *supra*. Nor was there any fraud of any kind practiced by the claimants in connection with said decision.

From November 13, 1871, when the claimants were notified of the rejection of their claim, up to the 15th day of January, 1880, there appears to have been no communication between the claimants and the United States. January 15, 1880, the claimants, by their attorneys, requested the then acting Commissioner of Internal Revenue to issue a warrant for the payment of the claim on the ground of its adjudication by Commissioner Pleasonton.

On the 27th day of January, 1881, the Commissioner declined either to reopen or forward the claim for payment, on the ground that he regarded it as rejected by a former Commissioner.

The Secretary of the Treasury, February 27, 1885, transmitted this matter to the Court of Claims under the provisions of section 1063 of the Revised Statutes of the United States, and the claimants filed their petition September 7, 1885. The case was fully heard by the Court of Claims, and on April 16, 1888, judgment was entered for the defendant, dismissing the petition. From this judgment the claimants appealed to this court.

The ground upon which the Court of Claims dismissed the petition is thus stated by the court:

> The court is of the opinion that an award of the Commissioner of Internal Revenue for the refund of a tax illegally assessed can not become final and irrevocable before it has passed out of the control of the Commissioner by being transmitted to the First Comp-

troller of the Treasury, as prescribed by the fifth regulation of the Secretary. While it remains in the office of the Commissioner it is subject to his revision, correction, or revocation. The court is accordingly of the opinion that in this case the action of Commissioner Pleasonton never reached the point of *ultimate decision*, and that when the case went back to the Commissioner's office with the advice of the Secretary of the Treasury, the final decision was to be exercised by the Commissioner, and necessarily by the Commissioner then in office—a decision which was adverse to the claim and final as regards all other jurisdictions.

The principal question before this court is whether there is error in the law thus stated.

ARGUMENT.

The statute (sec. 44, chap. 173, 13 U. S. Stat. L., 239) provides the method through which alone claimants have any right to recover of the United States "duties erroneously or illegally assessed or collected."

> That the Commissioner of Internal Revenue, subject to the regulations prescribed by the Secretary of the Treasury, shall be, and is hereby, authorized, on appeal to him made, to remit, refund, and pay back all duties erroneously or illegally assessed or collected, etc.

Under this statute the Commissioner was constituted a special tribunal to determine the right of repayment of the duties erroneously or illegally assessed or collected. In the language of Waite, C. J., in *The United States* v. *Kaufman* (96 U. S., 567), "It is not the allowance of an ordinary claim against the Government by an account-

ing officer, but the adjudication by the first tribunal to which the matter must by law be submitted."

The judgment of such officer can not be reviewed by any other officer or any tribunal.

Johnson v. *Towsley*, 13 Wall., 72.
Marquez v. *Frisbie*, 101 U. S., 473.
Dorsheimer v. *The United States*, 7 Wall., 166.
Woolner v. *The United States*, 13 C. Cls., R. 355.
Belcher et al. v. *Linn*, 24 How., 508, 522.
Stairs et al. v. *Peaslie*, 18 *Id.*, 524.
United States v. *Wright*, 11 Wall., 648.
Decatur v. *Paulding*, 14 Pet., 497.

In *Campbell's Case* (12 C. Cls. R., 470), the Chief Justice, after reviewing all the cases, said:

> On the other hand, where the right of a claimant was, by law, required to be determined by some executive officer, and it had either been determined against him or was still undetermined, we have held that we have no jurisdiction to overrule the decision already made, or to determine the matter here, and upon the basis of our determination render a judgment against the Government. The *Portland Company's Case* (5 C. Cls. R., 441); *Dougherty's Case* (6 *Id.*, 90); *Turner's Case* (9 *Id.*), 367).

The ground of right to recover, if at all, is precisely that set forth in *United States* v. *Kaufmann* (96 U. S., 567).

The claimants say an award favorable to Harris & Stotsbury was duly made by Commissioner Pleasonton July 26, 1871. This the defendant denies, and says that November 13, 1871, Commissioner Douglass duly decided adversely to the claim.

The principal question is:

Was a final judgment, favorable to the claimants, made July 26, 1871?

As has already been seen, Harris & Stotesbury, December 19, 1870, appealed to the Commissioner of Internal Revenue for a repayment of these taxes. On the same day the claim was indorsed. "Examined and rejected December 19, 1870, by Cs. Chesley." Mr. Chesley was the Solicitor of Internal Revenue. The following day Acting Commissioner Douglass sent notice to the collector at Philadelphia apprising him of the rejection of the claim. This was such a ratification of the indorsement of Mr. Chesley as would undoubtedly have worked a sufficient rejection of the claim had not Acting Commissioner Douglass on January 4, 1871, reopened the matter on petition of claimants. July 26, 1871, Commissioner Pleasonton having examined the claim, forwarded to the Secretary of the Treasury the schedule (p. 10 of the transcript of record). This action was in compliance with the regulations adopted July 12, 1866, by the Secretary of the Treasury in accordance with the terms of the statute. The claimants say that these facts show a definitive judgment in favor of Harris & Stotesbury. They say that the regulations of January 12, 1866, relating to refunding claims, are not valid and binding, so far as they require appeals to the Commissioner of Internal Revenue, to be submitted to the Secretary of the Treasury "for his consideration and advisement" before a final decision shall be made.

The propriety and legality of such regulations are clearly set forth in the opinion of Schofield, J., in *Sy-*

brandt et al. v. *The United States* (19 C. Cls. R., 461, 465). No clearer statement of the reasons for the decision can be made than that adopted by the Court of Claims:

> But it is said that the allowance by the Commissioner is not good, because when presented to the Secretary, according to regulation, he did not approve it. The regulation, it will be observed, requires the Commissioner, after examining a case, but "before it is finally decided to transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement." Of what use is all this it is said if the advice of the Secretary is not to be followed? A good deal. The influence of such a regulation is restraining as well as assisting to the Commissioner. It prevents hasty and inconsiderate action, subjects the Commissioner's proposed action to the knowledge and scrutiny of his official superior, and gives him the benefit of the Secretary's suggestions, but it does not attempt to coerce his final decision. It expressly provides that it shall be submitted to the Secretary "before it is finally decided." Finally decided by whom? Certainly not by the Secretary, because that would exhibit the Secretary as making a rule upon himself forbidding himself from deciding a case before he had ever seen it or even heard of it, but if the regulation had plainly provided that no tax should be refunded without the Secretary's approval it would have been not only in conflict with the statute, but would have, if effective, completely reversed its purpose. The Secretary would become the judge and the Commissioner the adviser. If Congress had so intended, the law should have provided that the Secretary, after consultation with the Commissioner, should order or reject the refund.

But if it were to be conceded that these regulations are not valid and binding, so far as they require appeals to the Commissioner of Internal Revenue to be submitted to the Secretary of the Treasury "for his consideration and advisement" before a final decree shall be made, still there was no judgment in favor of Harris & Stotesbury on July 26, 1871. Commissioner Pleasonton acted under the presumed legality of the regulations. He transmitted it to the Secretary of the Treasury for his consideration and advisement. He did not intend a final determination of the matter until such consideration and advisement was had and an answer returned. Under such circumstances, until the determination had passed from the control of the Commissioner, he must certainly have had the power to modify or reverse his decision. Commissioner Pleasonton having gone out of office before a final decision, the right to make a decision clearly devolved on his successor. This was not reversal of a judgment of a predecessor in office, for there was no final judgment prior to that of Commissioner Douglass.

STATUTE OF LIMITATIONS.

The claimants say an award in favor of Harris & Stotesbury was made by the Commissioner Pleasonton, July 26, 1871. The record shows that no claim for the payment of any sum under such award was made till January 15, 1880, nine and a half years later. If an award was made in behalf of claimants July 26, 1871, then the right to sue thereon in the Court of Claims accrued at once.

(*United States* v. *Kaufman*, 96 U. S., 567.) The claim is therefore barred by section 1069 of the Revised Statutes.

If there was no award in claimants' favor July 26, 1871, then the petition should be dismissed, for the reason that the court can proceed no further, as the jurisdiction to make an award is in the Commissioner of Internal Revenue.

JURISDICTION.

Neither had the Court of Claims jurisdiction to consider the matter under section 1063 of the Revised Statutes. The head of an executive department has power to submit "any claim" made "against any executive department, involving disputed facts or controverted questions of law, when the amount in controversy exceeds three thousand dollars," etc.

The proviso to this section is:

> *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.

It is evident that the case transmitted must involve "disputed facts or controverted questions of law" to be transmissible under this section; also, it must be one of which the Court of Claims would have jurisdiction under a voluntary petition.

It is plain that the Court of Claims could not have entertained a voluntary petition of claimants, because the

statute giving relief makes this the particular right and duty of the Commissioner of Internal Revenue.

Its "subject-matter and character" relate to the *nature* of the claim. In the case at bar there are no controverted questions of fact or law in the claimants' contention. These, they say, were fully settled by Commissioner Pleasonton. If this is true, then the Secretary of the Treasury had no authority under the statute to transmit this matter to the court. This question being jurisdictional, it is the duty of this court to act upon it, though not specifically a matter determined by the Court of Claims.

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